

AMENDED IN ASSEMBLY APRIL 11, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 749

Introduced by Assembly Member Gorell

February 21, 2013

An act to amend Section 143 of the Streets and Highways Code, relating to transportation.

LEGISLATIVE COUNSEL'S DIGEST

AB 749, as amended, Gorell. Public-private partnerships.

Existing law, until January 1, 2017, authorizes the Department of Transportation and regional transportation agencies, as defined, to enter into comprehensive development lease agreements with public and private entities, or consortia of those entities, for certain transportation projects that may charge certain users of those projects tolls and user fees, subject to various terms and requirements. These arrangements are commonly known as public-private partnerships. Existing law provides for the Public Infrastructure Advisory Commission, an organization established by the Business, Transportation and Housing Agency, to perform various functions relative to projects identified as suitable for development and delivery under these provisions, including the review of a proposed agreement submitted to it by the department or a regional transportation agency, and to charge a fee for certain of those functions.

~~This bill would delete the reference to the Public Infrastructure Advisory Commission established by the Business, Transportation and Housing Agency. The bill would instead create a new Public Infrastructure Advisory Commission, with 12 members, of which 5 would be appointed by the Governor, 3 by the Senate Committee on~~

Rules, and 2 by the Speaker of the Assembly. In addition, the Treasurer and the Director of General Services, or their representatives, would serve on the commission. The bill would assign additional duties to the commission, including a requirement for the commission to make a determination for each agreement submitted to it relative to whether the public-private partnership procurement method is suitable for the project, or whether another procurement method should be used, as specified. This determination would be binding on the department or regional transportation agency. The bill would require the commission to establish best practices for public-private partnerships, and to identify other state departments that would benefit from similar contracting authority. The bill would authorize the commission to charge a fee for certain of these new duties. The bill would also extend the operation of the provisions governing public-private partnerships from January 1, 2017, to January 1, 2019 2022. *The bill would also state the intent of the Legislature for a project developed under these provisions to have specified characteristics.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 143 of the Streets and Highways Code
2 is amended to read:
3 143. (a) (1) “Best value” means a value determined by
4 objective criteria, including, but not limited to, price, features,
5 functions, life-cycle costs, and other criteria deemed appropriate
6 by the department or the regional transportation agency.
7 (2) “Contracting entity or lessee” means a public or private
8 entity, or consortia thereof, that has entered into a comprehensive
9 development lease agreement with the department or a regional
10 transportation agency for a transportation project pursuant to this
11 section.
12 (3) “Design-build” means a procurement process in which both
13 the design and construction of a project are procured from a single
14 entity.
15 (4) “Regional transportation agency” means any of the
16 following:
17 (A) A transportation planning agency as defined in Section
18 29532 or 29532.1 of the Government Code.

1 (B) A county transportation commission as defined in Section
2 130050, 130050.1, or 130050.2 of the Public Utilities Code.

3 (C) Any other local or regional transportation entity that is
4 designated by statute as a regional transportation agency.

5 (D) A joint exercise of powers authority as defined in Chapter
6 5 (commencing with Section 6500) of Division 7 of Title 1 of the
7 Government Code, with the consent of a transportation planning
8 agency or a county transportation commission for the jurisdiction
9 in which the transportation project will be developed.

10 (5) “Public Infrastructure Advisory Commission” means ~~the~~
11 ~~commission created pursuant to paragraph (1) of subdivision (b)~~
12 ~~a unit or auxiliary organization established by the Business and~~
13 ~~Transportation Agency that advises the department and regional~~
14 ~~transportation agencies in developing transportation projects~~
15 ~~through performance-based infrastructure partnerships.~~

16 (6) “Transportation project” means one or more of the following:
17 planning, design, development, finance, construction,
18 reconstruction, rehabilitation, improvement, acquisition, lease,
19 operation, or maintenance of highway, public street, rail, or related
20 facilities supplemental to existing facilities currently owned and
21 operated by the department or regional transportation agencies
22 that is consistent with the requirements of subdivision (c).

23 (b) (1) ~~The Public Infrastructure Advisory Commission is~~
24 ~~hereby created. The commission shall have 12 members, with five~~
25 ~~members appointed by the Governor, three members appointed~~
26 ~~by the Senate Committee on Rules, two members appointed by~~
27 ~~the Speaker of the Assembly, the Treasurer or his or her~~
28 ~~representative, and the Director of General Services or his or her~~
29 ~~representative. The members appointed by the Governor and the~~
30 ~~Legislature shall have a broad mix of expertise related to~~
31 ~~public-private partnerships and shall serve for four-year terms~~
32 ~~commencing on January 1, 2014. The commission shall do all of~~
33 ~~the following:~~

34 (A) ~~Identify transportation project opportunities through~~
35 ~~performance-based infrastructure partnerships throughout the state.~~

36 (B) ~~Research and document similar transportation projects~~
37 ~~throughout the state, nationally, and internationally, and further~~
38 ~~identify and evaluate lessons learned from these projects.~~

39 (C) ~~Assemble and make available to the department or regional~~
40 ~~transportation agencies a library of information, precedent,~~

1 research, and analysis concerning infrastructure partnerships and
2 related types of public-private transactions for public infrastructure.

3 ~~(D) Develop a set of best practices for public-private partnership~~
4 ~~projects in California that are eligible to be developed pursuant to~~
5 ~~this section, and advise the department and regional transportation~~
6 ~~agencies, upon request, regarding infrastructure partnership~~
7 ~~suitability.~~

8 *(D) Advise the department and regional transportation agencies,*
9 *upon request, regarding infrastructure partnership suitability and*
10 *best practices.*

11 (E) Provide, upon request, procurement-related services to the
12 department and regional transportation agencies for infrastructure
13 partnership.

14 ~~(F) Make a determination, with respect to proposed agreements~~
15 ~~submitted to it for review pursuant to paragraph (5) of subdivision~~
16 ~~(e), whether a proposed project is best procured using the method~~
17 ~~authorized by this section or by another authorized method. The~~
18 ~~determination shall be binding on the department or regional~~
19 ~~transportation agency. In order for the Public Infrastructure~~
20 ~~Advisory Commission to make a determination that a project that~~
21 ~~is the subject of a proposed agreement is suitable for the~~
22 ~~procurement method authorized pursuant to this section, it shall~~
23 ~~find that the project meets all of the following criteria:~~

24 ~~(i) The project is technically complex.~~

25 ~~(ii) The project can transfer risks from a public agency to a~~
26 ~~private partner.~~

27 ~~(iii) The project can benefit from nonstate financing.~~

28 ~~(iv) The project has a revenue source.~~

29 (G) Identify state agencies other than the department that would
30 benefit from similar legal authority to develop partnerships to that
31 provided for transportation projects pursuant to this section.

32 (2) The Public Infrastructure Advisory Commission may charge
33 a fee to the department and regional transportation agencies for
34 the services described in subparagraphs (D); *and* (E); ~~and (F)~~ of
35 paragraph (1), the details of which shall be articulated in an
36 agreement entered into between the Public Infrastructure Advisory
37 Commission and the department or the regional transportation
38 agency.

39 (c) (1) Notwithstanding any other provision of law, only the
40 department, in cooperation with regional transportation agencies,

1 and regional transportation agencies, may solicit proposals, accept
2 unsolicited proposals, negotiate, and enter into comprehensive
3 development lease agreements with public or private entities, or
4 consortia thereof, for transportation projects.

5 (2) Projects proposed pursuant to this section and associated
6 lease agreements shall be submitted to the California Transportation
7 Commission. The commission, at a regularly scheduled public
8 hearing, shall select the candidate projects from projects nominated
9 by the department or a regional transportation agency after
10 reviewing the nominations for consistency with paragraphs (3)
11 and (4). Approved projects may proceed with the process described
12 in paragraph (5).

13 (3) The projects authorized pursuant to this section shall be
14 primarily designed to achieve the following performance
15 objectives:

16 (A) Improve mobility by improving travel times or reducing
17 the number of vehicle hours of delay in the affected corridor.

18 (B) Improve the operation or safety of the affected corridor.

19 (C) Provide quantifiable air quality benefits for the region in
20 which the project is located.

21 (4) In addition to meeting the requirements of paragraph (3),
22 the projects authorized pursuant to this section shall address a
23 known forecast demand, as determined by the department or
24 regional transportation agency.

25 (5) At least 60 days prior to executing a final lease agreement
26 authorized pursuant to this section, the department or regional
27 transportation agency shall submit the agreement to the Legislature
28 and the Public Infrastructure Advisory Commission for review.
29 Prior to submitting a lease agreement to the Legislature and the
30 Public Infrastructure Advisory Commission, the department or
31 regional transportation agency shall conduct at least one public
32 hearing at a location at or near the proposed facility for purposes
33 of receiving public comment on the lease agreement. Public
34 comments made during this hearing shall be submitted to the
35 Legislature and the Public Infrastructure Advisory Commission
36 with the lease agreement. The Secretary of Business, Transportation
37 and Housing or the chairperson of the Senate or Assembly fiscal
38 committees or policy committees with jurisdiction over
39 transportation matters may, by written notification to the
40 department or regional transportation agency, provide any

1 comments about the proposed agreement within the 60-day period
2 prior to the execution of the final agreement. The department or
3 regional transportation agency shall consider those comments prior
4 to executing a final agreement and shall retain the discretion for
5 executing the final lease agreement.

6 (d) For the purpose of facilitating those projects, the agreements
7 between the parties may include provisions for the lease of
8 rights-of-way in, and airspace over or under, highways, public
9 streets, rail, or related facilities for the granting of necessary
10 easements, and for the issuance of permits or other authorizations
11 to enable the construction of transportation projects. Facilities
12 subject to an agreement under this section shall, at all times, be
13 owned by the department or the regional transportation agency,
14 as appropriate. For department projects, the commission shall
15 certify the department's determination of the useful life of the
16 project in establishing the lease agreement terms. In consideration
17 therefor, the agreement shall provide for complete reversion of the
18 leased facility, together with the right to collect tolls and user fees,
19 to the department or regional transportation agency, at the
20 expiration of the lease at no charge to the department or regional
21 transportation agency. At the time of the reversion, the facility
22 shall be delivered to the department or regional transportation
23 agency, as applicable, in a condition that meets the performance
24 and maintenance standards established by the department or
25 regional transportation agency and that is free of any encumbrance,
26 lien, or other claims.

27 (e) Agreements between the department or regional
28 transportation agency and the contracting entity or lessee shall
29 authorize the contracting entity or lessee to use a design-build
30 method of procurement for transportation projects, subject to the
31 requirements for utilizing such a method contained in Chapter 6.5
32 (commencing with Section 6800) of Part 1 of Division 2 of the
33 Public Contract Code, other than Sections 6802, 6803, and 6813
34 of that code.

35 (f) (1) (A) Notwithstanding any other provision of this chapter,
36 for projects on the state highway system, the department is the
37 responsible agency for the performance of project development
38 services, including performance specifications, preliminary
39 engineering, prebid services, the preparation of project reports and
40 environmental documents, and construction inspection services.

1 The department is also the responsible agency for the preparation
2 of documents that may include, but need not be limited to, the size,
3 type, and desired design character of the project, performance
4 specifications covering the quality of materials, equipment, and
5 workmanship, preliminary plans, and any other information deemed
6 necessary to describe adequately the needs of the department or
7 regional transportation agency.

8 (B) The department may use department employees or
9 consultants to perform the services described in subparagraph (A),
10 consistent with Article XXII of the California Constitution.
11 Department resources, including personnel requirements, necessary
12 for the performance of those services shall be included in the
13 department's capital outlay support program for workload purposes
14 in the annual Budget Act.

15 (2) The department or a regional transportation agency may
16 exercise any power possessed by it with respect to transportation
17 projects to facilitate the transportation projects pursuant to this
18 section. The department, regional transportation agency, and other
19 state or local agencies may provide services to the contracting
20 entity or lessee for which the public entity is reimbursed, including,
21 but not limited to, planning, environmental planning, environmental
22 certification, environmental review, preliminary design, design,
23 right-of-way acquisition, construction, maintenance, and policing
24 of these transportation projects. The department or regional
25 transportation agency, as applicable, shall regularly inspect the
26 facility and require the contracting entity or lessee to maintain and
27 operate the facility according to adopted standards. Except as may
28 otherwise be set forth in the lease agreement, the contracting entity
29 or lessee shall be responsible for all costs due to development,
30 maintenance, repair, rehabilitation, and reconstruction, and
31 operating costs.

32 (g) (1) In selecting private entities with which to enter into
33 these agreements, notwithstanding any other provision of law, the
34 department and regional transportation agencies may utilize, but
35 are not limited to utilizing, one or more of the following
36 procurement approaches:

37 (A) Solicitations of proposals for defined projects and calls for
38 project proposals within defined parameters.

39 (B) Prequalification and short-listing of proposers prior to final
40 evaluation of proposals.

1 (C) Final evaluation of proposals based on qualifications and
2 best value. The California Transportation Commission shall
3 develop and adopt criteria for making that evaluation prior to
4 evaluation of a proposal.

5 (D) Negotiations with proposers prior to award.

6 (E) Acceptance of unsolicited proposals, with issuance of
7 requests for competing proposals. Neither the department nor a
8 regional transportation agency may award a contract to an
9 unsolicited bidder without receiving at least one other responsible
10 bid.

11 (2) When evaluating a proposal submitted by the contracting
12 entity or lessee, the department or the regional transportation
13 agency may award a contract on the basis of the lowest bid or best
14 value.

15 (h) The contracting entity or lessee shall have the following
16 qualifications:

17 (1) Evidence that the members of the contracting entity or lessee
18 have completed, or have demonstrated the experience, competency,
19 capability, and capacity to complete, a project of similar size,
20 scope, or complexity, and that proposed key personnel have
21 sufficient experience and training to competently manage and
22 complete the design and construction of the project, and a financial
23 statement that ensures that the contracting entity or lessee has the
24 capacity to complete the project.

25 (2) The licenses, registration, and credentials required to design
26 and construct the project, including, but not limited to, information
27 on the revocation or suspension of any license, credential, or
28 registration.

29 (3) Evidence that establishes that members of the contracting
30 entity or lessee have the capacity to obtain all required payment
31 and performance bonding, liability insurance, and errors and
32 omissions insurance.

33 (4) Evidence that the contracting entity or lessee has workers'
34 compensation experience, history, and a worker safety program
35 of members of the contracting entity or lessee that is acceptable
36 to the department or regional transportation agency.

37 (5) A full disclosure regarding all of the following with respect
38 to each member of the contracting entity or lessee during the past
39 five years:

1 (A) Any serious or willful violation of Part 1 (commencing with
2 Section 6300) of Division 5 of the Labor Code or the federal
3 Occupational Safety and Health Act of 1970 (P.L. 91-596).

4 (B) Any instance where members of the contracting entity or
5 lessee were debarred, disqualified, or removed from a federal,
6 state, or local government public works project.

7 (C) Any instance where members of the contracting entity or
8 lessee, or its owners, officers, or managing employees submitted
9 a bid on a public works project and were found to be nonresponsive
10 or were found by an awarding body not to be a responsible bidder.

11 (D) Any instance where members of the contracting entity or
12 lessee, or its owners, officers, or managing employees defaulted
13 on a construction contract.

14 (E) Any violations of the Contractors' State License Law
15 (Chapter 9 (commencing with Section 7000) of Division 3 of the
16 Business and Professions Code), including, but not limited to,
17 alleged violations of federal or state law regarding the payment of
18 wages, benefits, apprenticeship requirements, or personal income
19 tax withholding, or Federal Insurance Contributions Act (FICA)
20 withholding requirements.

21 (F) Any bankruptcy or receivership of any member of the
22 contracting entity or lessee, including, but not limited to,
23 information concerning any work completed by a surety.

24 (G) Any settled adverse claims, disputes, or lawsuits between
25 the owner of a public works project and any member of the
26 contracting entity or lessee during the five years preceding
27 submission of a bid under this article, in which the claim,
28 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
29 Information shall also be provided concerning any work completed
30 by a surety during this five-year period.

31 (H) If the contracting entity or lessee is a partnership, joint
32 venture, or an association that is not a legal entity, a copy of the
33 agreement creating the partnership or association that specifies
34 that all general partners, joint venturers, or association members
35 agree to be fully liable for the performance under the agreement.

36 (i) No agreement entered into pursuant to this section shall
37 infringe on the authority of the department or a regional
38 transportation agency to develop, maintain, repair, rehabilitate,
39 operate, or lease any transportation project. Lease agreements may
40 provide for reasonable compensation to the contracting entity or

1 lessee for the adverse effects on toll revenue or user fee revenue
2 due to the development, operation, or lease of supplemental
3 transportation projects with the exception of any of the following:

4 (1) Projects identified in regional transportation plans prepared
5 pursuant to Section 65080 of the Government Code.

6 (2) Safety projects.

7 (3) Improvement projects that will result in incidental capacity
8 increases.

9 (4) Additional high-occupancy vehicle lanes or the conversion
10 of existing lanes to high-occupancy vehicle lanes.

11 (5) Projects located outside the boundaries of a public-private
12 partnership project, to be defined by the lease agreement.

13 However, compensation to a contracting entity or lessee shall
14 only be made after a demonstrable reduction in use of the facility
15 resulting in reduced toll or user fee revenues, and may not exceed
16 the difference between the reduction in those revenues and the
17 amount necessary to cover the costs of debt service, including
18 principal and interest on any debt incurred for the development,
19 operation, maintenance, or rehabilitation of the facility.

20 (j) (1) Agreements entered into pursuant to this section shall
21 authorize the contracting entity or lessee to impose tolls and user
22 fees for use of a facility constructed by it, and shall require that
23 over the term of the lease the toll revenues and user fees be applied
24 to payment of the capital outlay costs for the project, the costs
25 associated with operations, toll and user fee collection,
26 administration of the facility, reimbursement to the department or
27 other governmental entity for the costs of services to develop and
28 maintain the project, police services, and a reasonable return on
29 investment. The agreement shall require that, notwithstanding
30 Sections 164, 188, and 188.1, any excess toll or user fee revenue
31 either be applied to any indebtedness incurred by the contracting
32 entity or lessee with respect to the project, improvements to the
33 project, or be paid into the State Highway Account, or for all three
34 purposes, except that any excess toll revenue under a lease
35 agreement with a regional transportation agency may be paid to
36 the regional transportation agency for use in improving public
37 transportation in and near the project boundaries.

38 (2) Lease agreements shall establish specific toll or user fee
39 rates. Any proposed increase in those rates not otherwise
40 established or identified in the lease agreement during the term of

1 the agreement shall first be approved by the department or regional
2 transportation agency, as appropriate, after at least one public
3 hearing conducted at a location near the proposed or existing
4 facility.

5 (3) The collection of tolls and user fees for the use of these
6 facilities may be extended by the commission or regional
7 transportation agency at the expiration of the lease agreement.
8 However, those tolls or user fees shall not be used for any purpose
9 other than for the improvement, continued operation, or
10 maintenance of the facility.

11 (k) Agreements entered into pursuant to this section shall include
12 indemnity, defense, and hold harmless provisions agreed to by the
13 department or regional transportation agency and the contracting
14 entity or lessee, including provisions for indemnifying the State
15 of California or the regional transportation agency against any
16 claims or losses resulting or accruing from the performance of the
17 contracting entity or lessee.

18 (l) The plans and specifications for each transportation project
19 on the state highway system developed, maintained, repaired,
20 rehabilitated, reconstructed, or operated pursuant to this section
21 shall comply with the department's standards for state
22 transportation projects. The lease agreement shall include
23 performance standards, including, but not limited to, levels of
24 service. The agreement shall require facilities on the state highway
25 system to meet all requirements for noise mitigation, landscaping,
26 pollution control, and safety that otherwise would apply if the
27 department were designing, building, and operating the facility.
28 If a facility is on the state highway system, the facility leased
29 pursuant to this section shall, during the term of the lease, be
30 deemed to be a part of the state highway system for purposes of
31 identification, maintenance, enforcement of traffic laws, and for
32 the purposes of Division 3.6 (commencing with Section 810) of
33 Title 1 of the Government Code.

34 (m) Failure to comply with the lease agreement in any significant
35 manner shall constitute a default under the agreement and the
36 department or the regional transportation agency, as appropriate,
37 shall have the option to initiate processes to revert the facility to
38 the public agency.

39 (n) The assignment authorized by subdivision (c) of Section
40 130240 of the Public Utilities Code is consistent with this section.

1 (o) A lease to a private entity pursuant to this section is deemed
2 to be public property for a public purpose and exempt from
3 leasehold, real property, and ad valorem taxation, except for the
4 use, if any, of that property for ancillary commercial purposes.

5 (p) Nothing in this section is intended to infringe on the authority
6 to develop high-occupancy toll lanes pursuant to Section 149.4,
7 149.5, or 149.6.

8 (q) Nothing in this section shall be construed to allow the
9 conversion of any existing nontoll or nonuser-fee lanes into tolled
10 or user fee lanes with the exception of a high-occupancy vehicle
11 lane that may be operated as a high-occupancy toll lane for vehicles
12 not otherwise meeting the requirements for use of that lane.

13 (r) The lease agreement shall require the contracting entity or
14 lessee to provide any information or data requested by the
15 California Transportation Commission or the Legislative Analyst.
16 The commission, in cooperation with the Legislative Analyst, shall
17 annually prepare a report on the progress of each project and
18 ultimately on the operation of the resulting facility. The report
19 shall include, but not be limited to, a review of the performance
20 standards, a financial analysis, and any concerns or
21 recommendations for changes in the program authorized by this
22 section.

23 (s) Notwithstanding any other provision of this section, no lease
24 agreement may be entered into pursuant to the section that affects,
25 alters, or supersedes the Memorandum of Understanding (MOU),
26 dated November 26, 2008, entered into by the Golden Gate Bridge
27 Highway and Transportation District, the Metropolitan
28 Transportation Commission, and the San Francisco County
29 Transportation Authority, relating to the financing of the U.S.
30 Highway 101/Doyle Drive reconstruction project located in the
31 City and County of San Francisco.

32 (t) No lease agreements may be entered into under this section
33 on or after January 1, ~~2019~~ 2022.

34 (u) *It is the intent of the Legislature that a project developed*
35 *under this section should have the following characteristics:*

36 (1) *A revenue source.*

37 (2) *The purpose of constructing additional capacity for the*
38 *transportation system.*

39 (3) *To the extent the project is proposed solely by a regional*
40 *transportation agency and does not involve the use of any state*

1 *funds, the proposing regional transportation agency and its private*
2 *sector partners should be entirely responsible for the risks*
3 *associated with the project, and the state should be protected from*
4 *any liability associated with the project.*

O